

EAI, and is in the process of correcting others.<sup>347</sup> [Complainants cannot stipulate to this paragraph. That Entergy is requiring Complainants to correct facilities that are the responsibility of others is the fundamental premise on which the Complaint is based.<sup>348</sup>]

194. It is also inappropriate and outside of the FCC's jurisdiction to determine whether or not EAI's *electric* facilities conform with the NESC or any other engineering standard. Jurisdiction only extends to the rates, terms and conditions for *pole attachments*, which are attachments by cable television systems and providers of telecommunications services.<sup>349</sup> To the extent that Complainants are seeking a mechanism for determining who should bear the responsibility for correcting a non-complaint, *i.e.* who was "last to the pole," this issue is addressed in Section VII. [Complainants cannot stipulate to this paragraph. It is well within the Commission's jurisdiction to determine whether pole owners are improperly charging attachers to correct other attachers', including the pole owner's, non-compliant facilities.<sup>350</sup>]

### 3. Stipulated Points of Law

195. None.

### 4. Disputed Points of Law

#### a) Complainants

---

<sup>347</sup> Inman Decl. Resp. Ex. 9 ¶ 27; Kelley Decl. Resp. Ex. 11 at ¶ 12.

<sup>348</sup> See Complaint

<sup>349</sup> 47 U.S.C. § 224(a).

<sup>350</sup> See *e.g.*, *Cavalier*, ¶ 16.

196. It is unjust and unreasonable for EAI to attribute its own violations to Complainants or to otherwise require Complainants to pay to correct EAI's own violations.<sup>351</sup> [EAI cannot stipulate to any of the statements in this section as EAI has not required payment of Complainants for EAI violations and applies the same standards to itself and to other attachers.<sup>352</sup>]

197. It is unjust and unreasonable for EAI to cite as violations plant conditions outside of Complainants' reasonable control.<sup>353</sup>

198. It is unjust and unreasonable for EAI to continue to create new violations while it requires Complainants to correct existing ones.

199. It is unjust and unreasonable to hold Complainants to higher engineering standards than EAI holds itself.

#### **b) EAI**

200. The FCC has no jurisdiction to pass on the compliance or non-compliance of EAI's facilities with respect to electrical safety codes and electrical industry standards, and this issue was not raised in the pleadings. The FCC only has statutory authority to address rates, terms and conditions for *pole attachments* – which are attachments made by a cable television system or a provider of telecommunications service.<sup>354</sup> While Complainants allege that installations made by EAI and others have been installed after

---

<sup>351</sup> See *Knology*, 18 FCC 24615, ¶ 40 (2003).

<sup>352</sup> Resp. at ¶¶ 52, 128; Buie Decl Resp. Ex. 4 at ¶ 49; Bettis Decl. Resp. Ex. 3 at ¶ 21.

<sup>353</sup> *Id.*

<sup>354</sup> 47 U.S.C. § 224(a).

cable equipment was installed and that these later installations caused the Complainant's facilities to be out of compliance, this issue as crafted by Complainants is broader than this, and is inappropriate. [Complainants cannot stipulate to this section. It is an unjust and unreasonable term or condition of attachment for EAI to require Complainants to correct violations EAI itself creates.<sup>355</sup> EAI's allocation of responsibility for violations was raised in the pleadings repeatedly and is a central issue in Complainants' action.<sup>356</sup> In addition, EAI's challenge to the FCC's jurisdiction notwithstanding, it has presented to the Commission record evidence purportedly supporting its claims that Complainants' facilities are in violation of the NESC and EAI's standards. Complainants see no substantive difference. Finally, the Commission has taken jurisdiction over this very question in previous cases.<sup>357</sup>]

201. Allocation of responsibility, the assumptions, and recordkeeping issues are discussed below in Section VII with respect to determining who bears the responsibility for correcting non-compliant conditions. Where a Cable Operator's facilities have been initially identified as non-compliant, EAI will accept evidence (in the form of an Arkansas-licensed P.E. certification) on a pole-specific basis that EAI or another party modified the pole later in time than the Complainants, and accordingly should bear the

---

<sup>355</sup> See e.g., *Cavalier*, ¶ 16.

<sup>356</sup> See e.g., Complaint Sec. IX; Reply Sec. X.

<sup>357</sup> See Record cites at Section II, above.

responsibility for correction. [Complainants cannot stipulate to this paragraph. Complainants have already explained its bases for disagreement in other sections<sup>358</sup>]

**E. Whether EAI's Allocation Of Inspection-Related Costs Is Unjust And Unreasonable.**

**1. Stipulated facts**

202. None.

**2. Disputed Facts**

**a) Cable Operators**

203. EAI's allocation of inspection-related costs is unjust and unreasonable because EAI derives a significant benefit from the information collected whereas Complainants derive a marginal benefit, at best. [EAI cannot stipulate to this statement as it is Complainants' conclusion of law. Moreover, USS inspection identified thousands of violations of the EAI contract standard, 95% of which would constitute violations of any version of the NESC.<sup>359</sup>]

204. Complainants do not derive a benefit from the vast majority of the information USS collects.<sup>360</sup> The only benefit Complainants could potentially derive is from a) the attachment count, b) at-pole and mid-span

---

<sup>358</sup> Harrelson Reply Report ¶¶ 37-45.

<sup>359</sup> Arnett Decl. Resp. Ex. 1 at ¶ 23; Tabor Decl. Resp. Ex. 17 at ¶ 20; Buie Decl. Resp. Ex. 4 at ¶¶ 29, 30, 48, 60, 86; Kelley Decl. Resp. Ex. 11 at ¶ 9.

<sup>360</sup> See, e.g., Declaration of Bennett Hooks at ¶ 33 (Compl. Exh. 4); Complaint Sec. IX.A.1.; USS Work Codes (Compl. Exh. 30); Sample Worksheets (Compl. Exh. 31); Dial Reply Decl. ¶¶ 11, 17-18; Billingsley Reply Decl. ¶ 64; Gould Reply Decl. ¶ 45.

measurements and c) resolutions for clearance issues relevant to Complainants' facilities.<sup>361</sup> [EAI cannot stipulate to these statements for the reasons cited above.]

205. However, other attachers, including EAI and SBC, implicated in clearance citations benefit equally from information related to at-pole and mid-span measurements and resolutions for clearance issues.<sup>362</sup> [EAI cannot stipulate to this statement. But for the outages, trouble reports, and test inspection results, EAI would not have conducted this inspection.<sup>363</sup> EAI has a large number of its own internal inspection programs.<sup>364</sup> EAI received an incidental benefit from the inspection that was a necessary byproduct of the process.<sup>365</sup> Recognizing this, EAI paid an appropriate portion of the inspection costs, even though it would be justified in charging the entire amount to the offending cable company.<sup>366</sup>]

206. In order to make use of the information USS provides, Complainants must send another contractor to the field to perform a second survey and analysis.<sup>367</sup> [EAI cannot stipulate to this statement. USS'

---

<sup>361</sup> See, e.g., Declaration of Bennett Hooks at ¶ 33 (Compl. Exh. 4); Complaint Sec. IX.A.1.

<sup>362</sup> Reply Exhibit 8; Billingsley Reply Decl. ¶ 65.

<sup>363</sup> Inman Decl. Resp. Ex. 9 at ¶ 7.

<sup>364</sup> Willems Decl. Resp. Ex. 20 at ¶¶ 20-30.

<sup>365</sup> Arnett Decl. Resp. Ex. 1 at ¶¶ 7-9; Inman Decl. Resp. Ex. 9 at ¶¶ 13-16.

<sup>366</sup> CTAG at ¶ 15; Inman Decl. Resp. Ex. 9 at ¶ 27.

<sup>367</sup> Billingsley Reply Decl., ¶¶ 61-63; Hooks Reply Decl., ¶ 21; Gould Reply Decl., ¶ 20; Dial Reply Decl., ¶ 17. Reply Exh. 4.

information is clear and thorough.<sup>368</sup> Complainants have not provided any information as to the results of any such survey.]

207. EAI used the audit results to correct 11,122 violations on distribution circuits in Little Rock, North Little Rock and Jacksonville and has additional corrections left to complete.<sup>369</sup> [EAI will stipulate to the following: Where EAI learned of a violation for its own plant incidental<sup>370</sup> to the inspection of the cable plant, EAI has taken affirmative action to correct those violations. EAI has corrected 11,122 violations in Little Rock, North Little Rock, and Jacksonville as of April 2005, and intends to complete all corrections by December 2005.<sup>371</sup>] EAI is using USS' results to modernize its plant management records.<sup>372</sup> [EAI cannot stipulate to this statement. USS' GPS data is not compatible with EAI's data systems.<sup>373</sup> EAI's only purpose was to find a common method for consistently identifying poles for remediation of cable plant safety violations.]<sup>374</sup>

b) EAI

208. EAI allocated inspection costs among itself and each cable company with attachments in a particular circuit by multiplying total inspection costs for a circuit by a fraction. The numerator of the fraction was

---

<sup>368</sup> See, e.g., Resp. Ex. 94.

<sup>369</sup> Kelley Decl. ¶ 12; Response

<sup>370</sup> Arnett Decl. Resp. Ex. 1 at ¶¶ 7-9; Inman Decl. Resp. Ex. 9 at ¶¶ 13-16; Kelley Decl. Resp. Ex. 11 at ¶ 12.

<sup>371</sup> Kelley Decl. Resp. Ex. 11 at ¶ 12.

<sup>372</sup> Reply Exhibit 6; Billingsley Reply Decl. ¶¶ 64-65; Gould Reply Decl. ¶¶ 45-46; Response Exh. 1, ¶ 6; Reply Exhibit 8.

<sup>373</sup> Wagoner Decl. Resp. Ex. 18 at ¶ 9.

<sup>374</sup> Id.

equal to the number of contacts a cable company had within a specific circuit. The denominator was equal to the total number of contacts of all cable companies within the circuit, plus the number of safety violations attributed to EAI and telephone companies for this same circuit.<sup>375</sup> [Complainants do not have independent knowledge of how EAI allocates survey costs, as a result, they cannot stipulate to this paragraph.]

209. EAI has paid inspection costs of \$780,115 and has billed Comcast, Alliance, and WEHCO the amount of \$1,551,950. To date, Comcast, Alliance, and WEHCO have not paid any portion of this amount.<sup>376</sup> [Complainants have no independent knowledge of how much EAI has paid in inspection costs and therefore cannot stipulate to it. Complainants do stipulate to the remainder of the paragraph.]

### **3. Stipulated law**

210. None

### **4. Disputed law**

#### **a) Complainants**

211. "The cost of an inspection of pole attachments should be borne solely by the cable company, if and only if, cable attachments are the sole

---

<sup>375</sup> Inman Decl. Resp. Ex. 9 at ¶¶ 32-34.

<sup>376</sup> Resp. at ¶ 225; Inman Decl. Resp. Ex. 9 at ¶¶ 27, 29.

ones inspected and there is nothing in the inspection to benefit the utility or other attacher to the pole.”<sup>377</sup>

212. “[A]n inspection designed to yield information about more than cable attachments, and thus to benefit other pole users, should not be paid for solely by the cable company.”<sup>378</sup> [EAI will stipulate that the quotations in the above two paragraphs are accurate. EAI cannot stipulate to the statements in the remaining paragraphs in this section for reasons cited above and in the following disputed law section.]

213. Where EAI and other parties use the information collected to their benefit, it is an unjust and unreasonable term or condition of attachment for EAI to require Complainants to bear all or most of the costs of USS’ inspections.<sup>379</sup>

214. Costs benefiting all attachers must be charged through the annual rental rate.<sup>380</sup> It is unjust and unreasonable for EAI to charge Complainants for the inspection as a non-recurring charge.<sup>381</sup>

#### b) EAI

---

<sup>377</sup> *Cable Texas, Inc. v. Entergy Services*, 14 FCC Rcd. 6647, at ¶ 13 (1999) (citing *Newport News Cablevision, Ltd. v. Virginia Power*, 7 FCC Rcd. 2610, at ¶ 9 (1992)).

<sup>378</sup> *First Commonwealth Communications v. Virginia Electric Power Co.*, 7 FCC Rcd. 2610, at ¶ 8 (1992).

<sup>379</sup> *Cable Texas, Inc. v. Entergy Services*, 14 FCC Rcd. 6647, at ¶ 13 (1999) (citing *Newport News Cablevision, Ltd. v. Virginia Power*, 7 FCC Rcd. 2610, at ¶ 9 (1992)); *First Commonwealth Communications v. Virginia Electric Power Co.*, 7 FCC Rcd. 2610, at ¶ 8 (1992).

<sup>380</sup> See *Knology*, 18 FCC Rcd. 24615 ¶¶ 28-35.

<sup>381</sup> *Cable Television Ass’n of Ga. v. Georgia Power Co.*, 18 FCC Rcd. 16333 (2003)



215. It would have been permissible for EAI to have billed the entire amount of the inspection costs to the Cable Operators under the contract and in accordance with FCC precedent.<sup>382</sup> That EAI opted to absorb any portion of the costs in recognition of the benefit that it received is evidence of good faith and is more than is required by law. Even if the FCC determines that costs should be allocated according to benefit, it is reasonable to allocate costs according to the violations identified in relation to total contacts to the poles in order to fairly apportion inspection costs according to relative culpability.<sup>383</sup> [Complainants cannot stipulate to this paragraph because FCC precedent set forth in Complainants' disputed points of law section above establishes that EAI, having determined that portion of the survey benefits itself and other attachers, is required by law to included the charges in the annual rental rate and is prohibited from passing charges through to Complainants.]

216. The inspections would not have been conducted but for the outages, trouble reports, and safety violations identified in the test inspection process.<sup>384</sup> [Complainants cannot stipulate. Complainants deny that there were outages, trouble reports and safety violations mandating the test

---

<sup>382</sup> *First Commonwealth Communications Inc. v. Virginia Electric & Power Co.*, 7 FCC Rcd 2614, ¶ 8 (1992) ("Any cost of inspection designed only to inspect cable attachments should be borne by the cable company.") *CTAG* at ¶ 15.

<sup>383</sup> Letters from W. Darling to J Brinker, Resp. Ex. 45; Inman Decl. Resp. Ex. 9 at ¶ 27.

<sup>384</sup> Inman Decl. Resp. Ex. 9 at ¶ 7.

inspection.<sup>385</sup>] EAI already has numerous internal safety and inspection programs that are designed to continually monitor its plant for safety, reliability and other problems and did not need another inspection program to identify these issues.<sup>386</sup> [Complainants cannot stipulate to this because they have no independent knowledge of this. Complainants do state that Entergy's maps and pole records were deficient prior to USS' inspections.<sup>387</sup> ]The inspections were narrowly tailored to address violations and safety issues associated with Complainants' attachments.<sup>388</sup> [Complainants cannot stipulate to this. The inspections were designed to yield valuable plant information and generate revenue for Entergy.<sup>389</sup>]

217. The inspection process, as it was intended, identified safety violations and related hazards associated with Complainants' attachments.<sup>390</sup>

---

<sup>385</sup> Summary pages, Response Exhs. 90-93; Billingsley Reply Decl. ¶¶ 6-16; Hooks Reply Decl. ¶¶ 5-12; Gould Reply Decl. ¶¶ 6-12; Allen Reply Decl. ¶¶ 4-12; Trouble Tickets 1023846013 and 1023846151, pages 1 and 2, Response Exhibit 91; Trouble Ticket 100009396, page 12, Tab 3, Volume 4, Response Exhibit 93; Trouble Ticket 1001045047, page 28, Tab 1, Volume 1, Response Exhibit 92; Outage Summary Charge, Reply p. 14; Trouble Ticket 1038412558, page 20, Tab 15, Volume 2, Response Exhibit 90; Trouble Ticket 1022516697, page 39, Tab one, Volume one, Response Exhibit 92; Harrelson Reply Report ¶¶ 12-15.

<sup>386</sup> Willems Decl. Resp. Ex. 20 at ¶¶ 18-29.

<sup>387</sup> Billingsley Reply Decl., ¶¶ 53, 64; Gould Reply Decl., ¶ 46; Hooks Decl. ¶¶ 30, 37; Dial Reply Decl., ¶ 11.

<sup>388</sup> Arnett Decl. Resp. Ex. 1 at ¶¶ 7-9; Inman Decl. Resp. Ex. 9 at ¶¶ 13-16.

<sup>389</sup> See Reply p. 89-91; *compare* Reply Exh. 6 with Response Exh. 94; Billingsley Reply Decl. ¶ 65; Gould Reply Decl. ¶ 45; Agenda, *2nd Joint Wire & Pole Usage Conference* at 5. Dave Inman, Entergy. Mr. Inman will be was scheduled to give a seminar entitled "Utilize Utility Infrastructure To Maximize All Revenue Opportunities" on July 18 & 19.

<sup>390</sup> Arnett Decl. Resp. Ex. 1 at Attachment B.

As Complainants argue, cable companies should be concerned with the safety of their plant and how it impacts the CATV and utility workers and the general public that come in contact with them. Nevertheless, EAI recognized that it and other attachers received an incidental benefit as a necessary by-product of the inspection process, *to wit*, identification of some safety violations with respect to equipment adjacent to CATV facilities or otherwise obvious without measurement.<sup>391</sup> EAI's allocation formula was a good-faith attempt to quantify that benefit.<sup>392</sup> [Complainants cannot stipulate to this paragraph as explained elsewhere in this document, Complainants disagree that Entergy cited true violations.<sup>393</sup> Further, for the reasons set forth in the preceding paragraph, Complainants disagree that EAI's allocation formula was a good faith attempt. Finally, for the reasons set forth in the preceding paragraph, Complainants disagree that Entergy's benefit was incidental. The inspections gathered valuable information for Entergy.<sup>394</sup>]

218. EAI did not derive a benefit from the GPS coordinates, maps, or photographs taken except to the extent that it allows EAI to verify whether the Cable Operators have made required corrections and provides a

---

<sup>391</sup> Arnett Decl. Resp. Ex. 1 at ¶¶ 7-9; Inman Decl. Resp. Ex. 9 at ¶¶ 13-16.

<sup>392</sup> Resp. at ¶ 13; Inman Decl. Resp. Ex. 9 at ¶ 31.

<sup>393</sup> Harrelson Reply Report ¶¶ 55-63.

<sup>394</sup> Billingsley Reply Decl., ¶¶ 53, 64; Gould Reply Decl., ¶ 46; Hooks Decl. ¶¶ 30, 37; Dial Reply Decl., ¶ 11. See Reply p. 89-91; *compare* Reply Exh. 6 with Response Exh. 94; Billingsley Reply Decl. ¶ 65; Gould Reply Decl. ¶ 45; Agenda, *2<sup>nd</sup> Joint Wire & Pole Usage Conference* at 5. Dave Inman, Entergy. Mr. Inman will be was scheduled to give a seminar entitled "Utilize Utility Infrastructure To Maximize All Revenue Opportunities" on July 18 & 19.

common/universal set of data for both parties to work from to address cable plant safety violations. EAI already has maps of its own system, and the GPS data is not compatible with its existing systems.<sup>395</sup> [Complainants cannot stipulate to this paragraph. As set forth in the preceding paragraphs, Entergy obtained valuable plant information as a result of the inspections. Further as set forth in the preceding paragraphs, Complainants disagree that EAI's existing maps were adequate. Complainants further state that they have no knowledge as to whether the GPS data is compatible with Entergy's existing systems. Complainants can only state that it is not useful to Complainants.<sup>396</sup>

**F. Where A Safety Inspection Is Necessitated By A Single Party, May The Entire Cost Of The Inspection Be Charged To That Party, Regardless Of Incidental Benefit To Others?**

**1. Stipulated Facts**

219. None

**2. Disputed Facts**

**a) Complainants**

220. This question is inappropriate because it assumes facts in dispute. Complainants cannot stipulate that the audit was "necessitated" by a single party<sup>397</sup> and that the benefit to other parties is merely "incidental."<sup>398</sup>

---

<sup>395</sup> Resp. at ¶¶ 134, 135; Wagoner Decl. Resp. Ex. 18 at ¶¶ 9-11.

<sup>396</sup> Billingsley Reply Decl. ¶ 31; Gould Reply Decl. ¶¶ 27, 44-45; Dial Reply Decl. ¶¶ 10-11; Hooks Decl. ¶ 24.

<sup>397</sup> Summary pages, Response Exhs. 90-93; Billingsley Reply Decl. ¶¶ 6-16; Hooks Reply Decl. ¶¶ 5-12; Gould Reply Decl. ¶¶ 6-12; Allen Reply Decl. ¶¶ 4-12; Trouble Tickets 1023846013 and 1023846151, pages 1 and 2, Response

As such, Complainants cannot respond. The appropriate question to ask is whether EAI's allocation of costs is just and reasonable. Complainants answer that question in subsection V.E. above.

**b) EAI**

221. Article V of the pole attachment agreements between EAI and the Cable Operators permits EAI to conduct inspections at the attachers' costs where a violation of the agreement has been discovered.<sup>399</sup> The pole attachment agreements require attachers to install and maintain their facilities in a safe manner which, at a minimum, includes adherence to the NESC and EAI's engineering standards.<sup>400</sup> Each of the Complainants have facilities present on EAI's poles that are non-compliant with the NESC and/or EAI's engineering standards.<sup>401</sup> [Complainants cannot respond to any statements of fact or law for the reasons set forth above.]

---

Exhibit 91; Trouble Ticket 100009396, page 12, Tab 3, Volume 4, Response Exhibit 93; Trouble Ticket 1001045047, page 28, Tab 1, Volume 1, Response Exhibit 92; Outage Summary Charge, Reply p. 14; Trouble Ticket 1038412558, page 20, Tab 15, Volume 2, Response Exhibit 90; Trouble Ticket 1022516697, page 39, Tab one, Volume one, Response Exhibit 92; Harrelson Reply Report ¶¶ 12-15.

<sup>398</sup> Billingsley Reply Decl., ¶¶ 53, 64; Gould Reply Decl., ¶ 46; Hooks Decl. ¶¶ 30, 37; Dial Reply Decl., ¶ 11. See Reply p. 89-91; *compare* Reply Exh. 6 with Response Exh. 94; Billingsley Reply Decl. ¶ 65; Gould Reply Decl. ¶ 45; Agenda, *2<sup>nd</sup> Joint Wire & Pole Usage Conference* at 5. Dave Inman, Entergy. Mr. Inman will be was scheduled to give a seminar entitled "Utilize Utility Infrastructure To Maximize All Revenue Opportunities" on July 18 & 19.

<sup>399</sup> Complaint Ex. 2A-2D at Article V.

<sup>400</sup> *Id.* at Article 2.3.

<sup>401</sup> Arnett Decl. Resp. Ex. 1 at Attachments B, C; Comcast Action Plan, Resp. Ex. 21.

222. EAI recorded a significant number of outage and trouble reports attributable to CATV facilities, and proceeded based on this information to contact the Cable Companies with their concerns.<sup>402</sup> When remediation did not occur, or was inadequate as in the case of Comcast, EAI proceeded to conduct test safety inspections of several electric circuits in the Comcast, Alliance and WEHCO service territories. When test inspection results illustrated a significant percentage of non-compliant attachments, EAI engaged USS to conduct a full safety inspection of the cable plant for these operators in accordance with Article V of the pole attachment agreements. The full inspection was not tied solely to the outage and trouble reports. Rather, the test inspections verified and validated the need to proceed to a full inspection.<sup>403</sup> [Complainants cannot respond to any statements of fact or law for the reasons set forth above.]

223. The full inspection was designed to address solely CATV plant and the safety violations uncovered in the test inspection process, and was not designed to be a complete inspection of all attachments to EAI's facilities.<sup>404</sup> EAI already has multiple programs designed to address safety, engineering and reliability issues associated with its own plant, and would

---

<sup>402</sup> Bettis Decl. Resp. Ex. 3 at ¶¶ 14-16; Inman Decl. Resp. Ex. 9 at ¶¶ 5-8, 17-18, 21; Neumeier Decl. Resp. Ex. 14 at ¶¶ 18-21; Welch Decl. Resp. Ex. 19 at ¶¶ 10-15; Ex. 90-93.

<sup>403</sup> Arnett Decl. Resp. Ex. 1 at ¶¶ 27, 36-37; Wagoner Decl. Resp. Ex. 18 at ¶¶ 41-42; Bettis Decl. Resp. Ex. 3 at ¶ 18; Neumeier Decl. Resp. Ex. 14 at ¶ 20; Willems Decl. Resp. Ex. 20 at ¶ 16; Exs. 82, -84, 88.

<sup>404</sup> Welch Decl. Resp. Ex. 19 at ¶ 13, 16.

not have conducted the full inspection of Complainants' plant but for the high incidents of non-compliance and safety concerns uncovered in the test inspections.<sup>405</sup> [Complainants cannot respond to any statements of fact or law for the reasons set forth above.]

224. Where an incidental benefit accrued to a third party as a necessary result of the inspection process, EAI made a good faith effort to quantify this benefit by allocating a portion of the inspection costs to that party through a ratio based on the violations discovered.<sup>406</sup> [Complainants cannot respond to any statements of fact or law for the reasons set forth above.]

### 3. Stipulated Law

225. None. [Complainants cannot stipulate to any points of law for the reasons set forth above.]

### 4. Disputed Points of Law

#### a) EAI

226. A utility may require an attacher to pay for the costs of a safety inspection where safety violations have been identified with respect to the attacher's facilities.<sup>407</sup> This is true regardless of the alleged "benefit" to another party. [Complainants cannot respond to any statements of fact or law for the reasons set forth above.]

---

<sup>405</sup> Bettis Decl. Resp. Ex. 3 at ¶ 18; Willems Decl. Resp. Ex. 20 at 18-29.

<sup>406</sup> Resp. at ¶ 40; Arnett Decl. Resp. Ex. 1 at ¶¶ 7-9; Inman Decl. Resp. Ex. 9 at ¶¶ 13-16, 31, Kelley Decl. Resp. Ex. 11 at ¶ 12.

<sup>407</sup> CTAG at ¶ 15.

**G. Whether The Inspection Charges And Costs For EAI-Mandated Plant Corrections Are Contrary To The Parties' Pole Attachment Agreements Or Are Otherwise Just And Reasonable.**

**1. Stipulated Facts**

227. Article V of the pole attachment agreements permits: (1) inspection and audit of new facilities; (2) periodic inspection to determine compliance with engineering and safety requirements; and (3) a full accounting and complete inspection of all joint use facilities if the Cable Operator violates the terms of the agreement. Article V further requires the Cable Operator to reimburse the utility for complete inspections, and requires attachers to take "immediate action" to correct violations.

228. Section 7.2 of the EAI Pole Agreements provides: "Electric Company may at its option use a physical inventory in lieu of perpetual inventory. The cost of such physical inventory shall be shared equally among the participating companies."<sup>408</sup>

**2. Disputed facts**

**a) Cable Operators**

229. EAI's inspection charges and costs for EAI-mandated plant corrections are contrary to the parties' pole attachment agreements and are unjust and unreasonable. [EAI cannot stipulate to this statement. As above, Article V of the pole attachment agreements permits safety inspections at the

---

<sup>408</sup> EAI Pole Agreements at § 7.2 (Exh. 2A-2D).



expense of the attacher necessitating the inspection. Corrections to the Cable Operators' own plant are properly borne by the Cable Operators.]

230. EAI retained USS to conduct its inspections, including a physical inventory of attachments without the input of any of the Complainants.<sup>409</sup> [EAI cannot stipulate to this statement. The Cable Operators do not have veto power over contractor selection. EAI was required to engage a contractor at a "competitive rate in consonance with the work to be done,"<sup>410</sup> which it did. EAI hired USS to conduct safety inspection of the CATV plant; this was not a physical inventory.<sup>411</sup> ]

231. Complainants were given no advance notice or opportunity to be involved in the selection of USS as the auditor.<sup>412</sup> [EAI cannot stipulate to this statement for the reasons cited above.]

232. Complainants are unable to participate in the inspections in anything other than an observer role.<sup>413</sup> [EAI cannot stipulate to this statement. EAI and USS actively pursued involvement of the Cable Operators in the full inspections. They each declined to participate.<sup>414</sup> ]

#### b) EAI

---

<sup>409</sup> Gould Decl. ¶ 19; Hooks Decl. ¶ 16;

<sup>410</sup> *Cable Texas, Inc. v. Entergy Services, Inc.*, 14 FCC Rcd 6647, ¶ 14 (Cable Bureau 1999).

<sup>411</sup> Response at ¶¶ 156-158; Inman Decl. Resp. Ex. 4 at ¶ 13.

<sup>412</sup> Declaration of Bennett Hooks at ¶ 13 (Exh. 4); Declaration of Charlotte Dial at ¶ 18 (Exh. 3).

<sup>413</sup> Harrelson Reply Report ¶ 24; Hooks Reply Dec. ¶ 39; Billingsley Reply Decl. ¶ 57; Dial Reply Decl. ¶ 15.

<sup>414</sup> Inman. Decl. Resp. Ex. 9 at ¶ 18; Wagoner Resp. Decl. Resp. Ex. 18 at ¶¶ 42, 49, 50, 54.

233. Costs for the inspection are chargeable to the violator under the terms of the agreements, and costs for correction are properly borne by the owner of the facility. As stated elsewhere, EAI has not required the Cable Operators to pay for corrections unrelated to the violations attributed to the Cable Operators' facilities. EAI is willing to review and accept evidence in the form of a certification from an Arkansas-licensed P.E. where a Cable Operator believes it is not responsible for the violation, is grandfathered, an exception should be applied, or where there was another demonstrable error.<sup>415</sup> [Complainants cannot stipulate to this section because Section V of the pole attachment agreement does not control allocation of costs for this inspection. Complainants have rebutted EAI's purported evidence allegedly showing that Complainants caused a significant number of outages and trouble calls.<sup>416</sup> Moreover, the violations EAI cites on its poles are not true violations<sup>417</sup> and many of the conditions EAI cites as violations are conditions

---

<sup>415</sup> Tabor Decl. Resp. Ex. 17 at ¶¶ 17-19; Inman Decl. Resp. Ex. 9 at ¶¶ 35-36; Harrell Decl. Resp. Ex. 8 at ¶ 21 .

<sup>416</sup> Summary pages, Response Exhs. 90-93; Billingsley Reply Decl. ¶¶ 6-16; Hooks Reply Decl. ¶¶ 5-12; Gould Reply Decl. ¶¶ 6-12; Allen Reply Decl. ¶¶ 4-12; Trouble Tickets 1023846013 and 1023846151, pages 1 and 2, Response Exhibit 91; Trouble Ticket 100009396, page 12, Tab 3, Volume 4, Response Exhibit 93; Trouble Ticket 1001045047, page 28, Tab 1, Volume 1, Response Exhibit 92; Outage Summary Charge, Reply p. 14; Trouble Ticket 1038412558, page 20, Tab 15, Volume 2, Response Exhibit 90; Trouble Ticket 1022516697, page 39, Tab one, Volume one, Response Exhibit 92; Harrelson Reply Report ¶¶ 12-15.

<sup>417</sup> See Harrelson Report and Harrelson Reply Report, *passim*.

consistent with the parties' past construction practices as well as EAI's current construction practices.<sup>418]</sup>

### **3. Stipulated points of law**

234. None

### **4. Disputed points of law**

#### **a) Complainants**

235. EAI's refusal to allow Complainants to participate in the selection of the contractor and EAI's requirement that Complainant pay USS' charges are contrary to the pole attachment agreement.<sup>419</sup> [EAI cannot stipulate to this statement. This is Complainants' interpretation of contract language that speaks for itself.]

236. It is unjust and unreasonable for EAI to design an inspection program at Complainants expense without permitting any meaningful participation in design or implementation.<sup>420</sup> [EAI cannot stipulate to this statement as it is Complainants' conclusion of law and for the reasons cited above.]

#### **b) EAI**

237. The Cable Operators do not have veto power over contractor selection. EAI was required to engage a contractor at a "competitive rate in consonance with the work to be done," which it did.<sup>421</sup> EAI hired USS to

---

<sup>418</sup> See Section IV.B. above.

<sup>419</sup> EAI Pole Agreements at § 7.2 (Exh. 2A-2D).

<sup>420</sup> See *Cable Texas*, 14 FCC Rcd. 6647, at ¶ 14.

<sup>421</sup> *Cable Texas* at ¶ 14.

conduct safety inspection of the CATV plant; this was not a physical inventory.<sup>422</sup> This is in accordance with the pole attachment agreements and is just and reasonable.<sup>423</sup> [Complainants cannot stipulate to this paragraph. Complainants have not asserted a right to veto power, they have asserted their right, under the agreements, to participate in the inspection. Further, Complainants dispute that the inspections were not physical inventories. Entergy is using the results to claim alleged unauthorized attachments and to create maps showing the physical location of all attachments.<sup>424</sup>]

**H. Whether it is just and reasonable for EAI to charge Complainants for inspections of poles to which Complainants are not attached**

**1. Stipulated facts**

238. USS inspected poles to which Complainants were not attached.

**2. Disputed facts**

**a) Complainants**

239. It is unjust and unreasonable for EAI to charge Complainants for inspections of poles to which Complainants are not attached. [EAI cannot stipulate to this statement as it is Complainants' conclusion of law.]

240. EAI is charging Complainants for inspections of other poles to which they are not attached.<sup>425</sup> [EAI cannot stipulate to this statement in

---

<sup>422</sup> Response at ¶¶ 156-158; Inman Decl. Resp. Ex. 4 at ¶ 13.

<sup>423</sup> CTAG at ¶ 15.

<sup>424</sup> See Response and Section IV, above.

<sup>425</sup> Declaration of Marc Billingsley at ¶¶ 33-35, 58 (Compl. Exh. 6); Response ¶ 518, p. 238; Response ¶ 531, p. 242; Wagoner Decl. ¶¶ 6-9; Compl. Sec. IX.C.1.; Reply Sec. X.B.3.

the manner phrased. EAI initially billed Complainants for inspections of EAI poles to which there were no cable attachments.]

241. EAI—not Complainants--derives a benefit from inspections of poles to which Complainants are not attached.<sup>426</sup> [EAI cannot stipulate to this statement for the reasons stated below.]

b) EAI

242. Due to the to the failure to provide maps on the part of Comcast and the provision of inadequate maps in the case of Alliance,<sup>427</sup> USS inspected some poles to which Complainants were not attached. The “inspection” of these poles, however, consisted only of a “drive by” that took a negligible amount of time to determine that there were no cable attachments.<sup>428</sup> No measurements were taken for these poles.<sup>429</sup> [Complainants cannot stipulate to this section. Complainants have maps and have shared them with EAI.<sup>430</sup> In addition, the survey of poles to which Complainants are not attached yields valuable information to EAI.<sup>431</sup> Complainants have no personal knowledge as to how long the “drive” by inspections took as they are not detailed in USS’ bills.<sup>432</sup> Further,

---

<sup>426</sup> Gould Reply Decl. ¶ 45; Billingsley Reply Decl. ¶ 65; Compl. Sec. IX.C.1.; Reply Sec. X.B.3.

<sup>427</sup> Wagoner Decl. Resp. Ex. 18 at ¶ 13; Letter from W. Darling to K. Birch Resp. Ex. 26.

<sup>428</sup> Arnett Decl. Resp. Ex. 1 at ¶ 8.

<sup>429</sup> Resp. at ¶ 159; Wagoner Decl. Resp. Ex. 18 at ¶ 9.

<sup>430</sup> Dial Reply Decl. ¶¶ 8-12; Hooks Reply Decl. ¶¶ 24-25; Gould Reply Decl. ¶¶ 27, 44-46; Billingsley Reply Decl. ¶ 31.

<sup>431</sup> Billingsley Reply Decl. ¶ 65.

<sup>432</sup> See e.g., Complaint Exhs 13, 14, 19, 22, 32.

Complainants have no basis on which to determine whether measurement were or were not taken.]

**3. Stipulated points of law**

243. None

**4. Disputed points of law**

**a) Complainants**

244. EAI may only charge Complainants for inspections from which Complainants derive a benefit.<sup>433</sup> [EAI cannot stipulate to this statement. EAI is entitled to charge Complainants for inspections necessitated by the attachers' safety violations.<sup>434</sup>]

245. Complainants derive no benefit from EAI's inspections of poles without Complainants' attachments.<sup>435</sup> [EAI cannot stipulate to this statement for the reasons stated above.]

**b) EAI**

246. Where information as to the location of facilities has been withheld or is otherwise not provided<sup>436</sup> and/or where an entity has a history

---

<sup>433</sup> *Cable Texas, Inc. v. Entergy Services*, 14 FCC Rcd. 6647, at ¶ 13 (1999) (citing *Newport News Cablevision, Ltd. v. Virginia Power*, 7 FCC Rcd. 2610, at ¶ 9 (1992)).

<sup>434</sup> CTAG at ¶ 15.

<sup>435</sup> *Cable Texas, Inc. v. Entergy Services*, 14 FCC Rcd. 6647, at ¶ 13 (1999) (citing *Newport News Cablevision, Ltd. v. Virginia Power*, 7 FCC Rcd. 2610, at ¶ 9 (1992)).

<sup>436</sup> Wagoner Decl. Resp. Ex. 18 at ¶ 13; Letter from W. Darling to K. Birch Resp. Ex. 26.

of unauthorized attachments and safety violations,<sup>437</sup> as is the case here, it is reasonable for a utility to conduct limited inspections to ascertain the presence or absence of CATV attachments. [Complainants cannot stipulate to this paragraph. First, this statement has no basis in law. Second, Complainants have not withheld maps.<sup>438</sup> Third, Complainants do not have a history of unauthorized attachments or safety violations.<sup>439</sup>]

**I. Whether It Is Just And Reasonable For EAI To Charge Complainants For Inspections Of Poles Owned By SBC Or Other Companies.**

**1. Stipulated facts**

247. USS inspected poles that contained both EAI's and Complainants' attachments, but which were owned by a third party. This

---

<sup>437</sup> See, e.g., Arnett Decl. Resp. Ex. 1 at ¶¶ 27,36-37; Wagoner Decl. Resp. Ex. 18 at ¶¶ 41-42; Bettis Decl. Resp. Ex. 3 at ¶ 18; Neumeier Decl. Resp. Ex. 14 at ¶ 20; Willems Decl. Resp. Ex. 20 at ¶ 16; Exs. 46-66, 31, 82,-84, 88; Ex. 94.

<sup>438</sup> Dial Reply Decl. ¶¶ 8-12; Hooks Reply Decl. ¶¶ 24-25; Gould Reply Decl. ¶¶ 27, 44-46; Billingsley Reply Decl. ¶ 31.

<sup>439</sup> Billingsley Decl. ¶¶ 41-46; Dial Decl. ¶¶ 8-12; Summary pages, Response Exhs. 90-93; Billingsley Reply Decl. ¶¶ 6-16; Hooks Reply Decl. ¶¶ 5-12; Gould Reply Decl. ¶¶ 6-12; Allen Reply Decl. ¶¶ 4-12; Trouble Tickets 1023846013 and 1023846151, pages 1 and 2, Response Exhibit 91; Trouble Ticket 100009396, page 12, Tab 3, Volume 4, Response Exhibit 93; Trouble Ticket 1001045047, page 28, Tab 1, Volume 1, Response Exhibit 92; Outage Summary Charge, Reply p. 14; Trouble Ticket 1038412558, page 20, Tab 15, Volume 2, Response Exhibit 90; Trouble Ticket 1022516697, page 39, Tab one, Volume one, Response Exhibit 92; Harrelson Reply Report ¶¶ 12-15. Determining the presence or absence of CATV attachments falls under the category of inspections conducted for inventory purposes, not safety inspections. As such, EAI's inspection is governed by Section 7.2 of the pole attachment agreements.

also included mid-span measurements between poles owned by EAI and another party.<sup>440</sup>

## 2. Disputed facts

248. It is unjust and unreasonable for EAI to charge Complainants for inspections of poles owned by SBC or other companies. [EAI cannot stipulate to this statement for the reasons cited below.]

249. EAI is charging Complainants for inspections of SBC owned poles.<sup>441</sup> [EAI cannot stipulate to this statement as phrased. EAI initially billed Complainants for inspections of SBC owned poles.] However, EAI has no legal or contractual right to inspect telephone utilities' poles at Complainants' expense.<sup>442</sup> [EAI cannot stipulate to the last sentence in this paragraph or to the remaining statements in this section for the reasons stated below in the disputed law section.]

250. Complainants have independent relationships and pole attachment agreements with telephone utilities.<sup>443</sup>

251. Complainants' derive no benefit from EAI's inspection of SBC poles.<sup>444</sup>

### a) EAI

---

<sup>440</sup> Arnett Decl. Resp. Ex. 1 at ¶ 9.

<sup>441</sup> See Letter dated June 4, 2003, Compl. Exhibit 23); Response ¶ 553, pp. 249-250.

<sup>442</sup> EAI Pole Agreements (Exh. 2A-2D). Compl. IX.C.2.; Reply X.B.3.; Billingsley Decl. ¶ 60.

<sup>443</sup> See, e.g., Declaration of Marc Billingsley at ¶¶ 33-35, 46 (Exh. 6). Compl. IX.C.2.; Reply X.B.3.

<sup>444</sup> Billingsley Decl. ¶¶ 33-35, 46, 60; Compl. IX.C.2.; Reply X.B.3.



252. Third-party owned poles consisted of only a small percent of the poles inspected. For Comcast, only 12.31% of the Comcast contacts inspected were located on non-EAI poles. For Alliance, only 0.6% of the contacts inspected were on non-EAI poles. For WEHCO, only 7.73% of contacts inspected were on non-EAI poles, and for Cox only 7.3% of the contacts inspected (during pre-construction engineering) were on non-EAI poles.<sup>445</sup> Inspections also included mid-span measurements between poles owned by EAI and another party.<sup>446</sup> [Complainants cannot stipulate to this because they do not have personal knowledge of this.]

### 3. Stipulated Points of Law

253. None

### 4. Disputed Points of Law

#### a) Complainants

254. EAI's requirement that Complainants pay USS' charges to inspect other utilities' poles is an unjust and unreasonable term or condition of attachment.<sup>447</sup> [EAI cannot stipulate to the statements in this section for the reasons stated below.]

---

<sup>445</sup> Arnett Decl. Resp. Ex. 1 at ¶ 9, Attachment C.

<sup>446</sup> Arnett Decl. Resp. Ex. 1 at ¶ 9.

<sup>447</sup> *Cable Texas, Inc. v. Entergy Services*, 14 FCC Rcd. 6647, at ¶ 13 (1999) (citing *Newport News Cablevision, Ltd. v. Virginia Power*, 7 FCC Rcd. 2610, at ¶ 9 (1992)).